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To: Microsoft ATR
Date: 1/28/02 5:08pm
Subject: Microsoft Settlement

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
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RE: Microsoft Settlement

Dear Ms. Hesse:

Please find attached the Tunney Act comments of the Computing Technology Industry Association (CompTIA) relating to Microsoft settlement.

The attached file is formated in Word Perfect 9. Please let me know if you have any difficulties downloading and/or formatting this file and I will be happy to provide it to you in a different format.

Thank you for the opportunity to submit these comments. I would appreciate your acknowledgment of receipt of these comments. Thank you.

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□□□ CompTIA®

Comments of the Computing Technology Industry Association on the Revised Proposed Final Judgment in *United States v. Microsoft*

Submitted to the United States Department of Justice pursuant to the Tunney Act, 15 U.S.C. § 16

January 28, 2002

I. EXECUTIVE SUMMARY

CompTIA supports the Revised Proposed Final Judgment (RPFJ) entered into between the United States Department of Justice, nine states, and Microsoft on November 6, 2001. The RPFJ represents a reasonable compromise of the parties' respective positions in this case. The benchmark under which the settlement must be judged is whether it is consistent with the United States Court of Appeals June 28, 2001 opinion. The Court of Appeals found that Microsoft took actions to unlawfully maintain its monopoly in the operating system market, but also ruled that Microsoft had not attempted to unlawfully monopolize the Internet browser market nor did it unlawfully tie its Internet Explorer to the Windows operating system. The RPFJ represents a reasonable balance of the Court of Appeals split decision by imposing obligations upon Microsoft in the areas where it was found liable, and avoiding obligations in areas where Microsoft's conduct was not found to be unlawful. As such, the RPFJ is narrowly tailored to fit the violations and will likely avoid collateral damages to the marketplace.

After the November 6, 2001 Proposed Final Judgment was announced many of Microsoft's competitors complained that the settlement was too lenient. The antitrust laws, however, make clear that the settlement should not be designed as a wish list for Microsoft's competitors. The settlement should fairly address the areas of liability found by the Court of Appeals. Anything less would encourage Microsoft and other companies to engage in anticompetitive conduct in the future; anything more would inappropriately imperil the technology marketplace and cause harm to consumers.

The terms of the RPFJ insure that the technology sector will continue to expand and innovate. The settlement places strong and appropriate checks on Microsoft in areas where such checks are needed, but is designed in such a way that Microsoft will be able to compete fairly and aggressively in all markets. CompTIA urges the United States District Court to approve the settlement and reject the non-settling states more extensive remedy proposal as that would erode intellectual property protection, harm competition, and stall growth in the industry.

The only significant reservation regarding the RPFJ that CompTIA holds is that the settlement obligates Microsoft to disclose an abundance of intellectual property to the Plaintiffs and the Technical Committee. While this technical information is to be used for the purpose of achieving the interoperability goals specifically identified in the RPFJ, CompTIA is concerned that the precedent established by these disclosure provisions will be harmful to the technology sector in the long run. Innovation and growth in the IT industry are fostered by strong protection of intellectual property rights. If every antitrust violation is remedied by a wholesale forfeiture of valuable proprietary information by the defendant, intellectual property rights will suffer a significant blow. And, justifying the forced disclosure of a company's valuable technical information on the ground that it will be used for "interoperability" purposes only is not a sufficient protection. Because there is no bright line as to what constitutes "interoperability" information and what does not, the chance of valuable intellectual property being compromised is high.

CompTIA's reservation notwithstanding, we believe the settlement will benefit the industry as a whole and we respectfully urge the District Court to approve the RPFJ.

II. COMPTIA'S INTEREST IN THIS MATTER

The Computing Technology Industry Association (CompTIA) is the world's largest trade association in the information technology and communications sector. CompTIA represents over 8,000 hardware and software manufacturers, distributors, retailers, Internet, telecommunications, IT training and other service companies in over 50 countries. The overwhelming majority of CompTIA members are resellers – companies that resell software and hardware to consumers, businesses, or other resellers. These resellers are vendor-neutral and their objective is to be able to sell whatever products their customers wish to buy. In that sense they believe that antitrust laws should focus primarily on consumer impact rather than competitor impact. Microsoft is a member of CompTIA as are many of Microsoft's competitors.

In 1998, CompTIA's Board of Directors adopted a formal policy statement on antitrust. That statement supports sensible antitrust enforcement that is based on demonstrable economic effects in the marketplace. CompTIA believes that market forces typically correct any temporary market imperfections and that government regulators should only intervene in the technology marketplace when there is overwhelming evidence of a substantial and pervasive market failure. Pursuant to its policy statement, CompTIA has written and spoken frequently on antitrust issues of relevance to the technology sector. In June 1998, CompTIA filed an *amicus* brief in the *Intel v. Intergraph* litigation in the U.S. Court of Appeals for the Federal Circuit. In that case CompTIA urged the court to reject a lower court's finding that antitrust allegations could be a basis for ordering a company to disclose its valuable intellectual property.

CompTIA co-authored an *amicus* brief in the United States Court of Appeals for the District of Columbia Circuit in the *United States v. Microsoft* case in November 2000. The *amicus* brief urged the Court of Appeals to reverse the District Court's order breaking Microsoft into two separate companies and further discussed the negative industry-wide ramifications of the District Court's liability findings were they all permitted to stand. The basis for CompTIA's participation as *amicus* and submission of these Comments is its interest in the overall health and prosperity of the technology sector.

III. THE CONSENT JUDGMENT IS IN THE PUBLIC INTEREST AND SHOULD BE APPROVED BY THE COURT

A. Standards Under Which the RPFJ Should Be Judged

Under the Tunney Act, 15 U.S.C. § 16, the consent judgment should be approved if it is in the "public interest." The public interest analysis must be measured by the objectives of the antitrust laws; public interest concerns that are not within the purview of the antitrust laws are irrelevant. *U.S. v. AT&T*, 552 F. Supp 131 (D.D.C. 1982), *affirmed*, 103 S.Ct. 1240 (1983). Nor is their a requirement that the settlement be, in the eyes of the District Court, "the best possible settlement that could have been obtained;" the settlement must simply be within the reaches of the public interest. *U.S. v. Agri-Mark, Inc.*, 512 F. Supp 737 (D. Vt. 1981). In short the District Court should not reject the consent judgment "merely because [s]he believe[s] other remedies [are] preferable." *United States v. Microsoft*, 56 F.3d 1448, 1460 (D.C. Cir. 1995).

The language of the Tunney Act sets forth specific areas of inquiry relating to the public interest:

> For the purpose of such determination, the court may consider - (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment; (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint

> including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). Focusing on selected areas identified within the Tunney Act, CompTIA sets forth its analysis of the RPFJ below.

B. The Competitive Impact of Such Judgment

1. Termination of Violations

The RPFJ closely tracks the liability findings from the Court of Appeals opinion. First, the settlement prohibits Microsoft from retaliating against any OEM (original equipment manufacturer) because of an OEM's participation in promoting or developing non-Microsoft middleware or a non-Microsoft operating system. This provision takes the "club" out of Microsoft's hand and prevents the company from using anticompetitive means to discourage OEM's from promoting or preventing rival software from being developed or installed on the Windows desktop.

The anti-retaliation provisions of the RPFJ even go so far as to prohibit Microsoft from altering its license with an OEM even if the OEM offers

> users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches ***prior to the start of the Windows Operating System Product.***

RPFJ at § III.C.4 (emphasis added). Thus, an OEM has the full ability to make decisions based on price, features and performance with respect to whether an alternative operating system will be loaded on its computers; and that operating system product may appear to the user before Windows does. This flexibility will insure that operating systems that compete with Windows will have a full opportunity to reach the consumer. Once there, the decision about whether they succeed or fail is in the hands of consumers. These anti-retaliation provisions deal head on with the bulk of the conduct the Court of Appeals found to be illegal in the monopoly maintenance section of its June 28, 2001 opinion.

Second, Microsoft is obligated to adhere to one uniform license agreement for Windows with the top twenty OEM's and the royalty for the license shall be made publically available on a web site accessible by all OEM's. The price schedule may vary for volume discounts and for those OEM's who are eligible for market development allowances in connection with Windows products. This allows Microsoft to continue to compete in all software markets with other software manufacturers and this competition will continue to benefit consumers.

Third, OEM's are permitted to alter the appearance of the Windows desktop to add icons, shortcuts and menu items for non-Microsoft middleware, and they may establish non-Microsoft programs as default programs in Windows. Consumers also have the option of removing the interface with any Microsoft middleware product.

Fourth, Microsoft must reveal the API's used by Microsoft middleware to interoperate with the Windows operating system. Microsoft must also offer to license its intellectual property rights to any entity who has need for the intellectual property to insure that their products will interoperate with the Windows operating system.

These central features of the settlement insure that other companies have the ability to challenge Microsoft products, both in the operating system and middleware / applications markets, and are not unfairly shut out of those markets as a result of Microsoft's operating system monopoly. Consumers and OEM's have far greater freedom to install and use non-Microsoft products, Microsoft is prohibited from retaliating against any entity who promotes non-Microsoft programs, and all companies have equal access to Microsoft API's and technical information so that non-Microsoft middleware has the same opportunity to perform as well as Microsoft middleware. At the same time the RPFJ does not prevent Microsoft from integrating new technology into the Windows operating system and does not prohibit Microsoft from competing in any market that it chooses to enter. Such restrictions would have harmed consumers and been antithetical to the goals of the antitrust laws.

Because the RPFJ adheres closely and effectively addresses the liability findings of the Court of Appeals, it is a reasonable settlement and therefore in the public interest.

Finally, the Court of Appeals directed the District Court to consider whether there is a "causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market." *United States v. Microsoft*, 253 F.3d 34, 106 (D.C. Cir.), *cert. denied*, 122 S.Ct. 350 (2001). And while this direction was made in the context of whether structural relief is appropriate, it is logical to conclude that the foundation of that inquiry remains highly relevant even though structural relief is no longer at issue in this case. In the absence of evidence that the marketplace would have looked any differently absent Microsoft's anticompetitive behavior, the RPFJ provisions that enjoin the conduct found unlawful by the Court of Appeals are appropriate and in the public interest. Any remedy that extends beyond the monopoly maintenance findings by the Court of Appeals would not be in the public interest absent a finding of causal connection showing actual harm in the marketplace, and clear evidence of how the remedy would obviate the harm, while avoiding collateral damage to the marketplace.

2. Commingling of Software Code

Some may criticize the settlement because the RPFJ does not address the issue of Microsoft's commingling of operating system code and Internet Explorer code which was found to be unlawful. *See United States v. Microsoft*, 253 F.3d 34, 66 (D.C. Cir. 2001). The Court of Appeals concluded that Microsoft's commingling of code "deters OEMs [original equipment manufacturers] from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system." *Id.*

While Microsoft vigorously contested this finding of fact, and the Court of Appeals elsewhere acknowledged potential efficiencies from commingling of code,[1] the Court denied Microsoft's petition for rehearing on this issue. In denying Microsoft's petition, however, the Court of Appeals expressly noted that "[n]othing in the Court's opinion is intended to preclude the District Court's consideration of remedy issues." Order, August 2, 2001. Thus, the Court of Appeals signaled that its finding that Microsoft unlawfully commingled code does not necessarily mandate a remedial order requiring Microsoft to separate the code. Given the variety of other provisions in the RPFJ that encourage OEMs to place non-Microsoft middleware on the desktop, the consent judgment does not fail for the fact that it does not require Microsoft to "separate" the code. In the overall totality of circumstances, it is reasonable to conclude that the public interest would be better served by avoiding an order that would require Microsoft to

[1] "Bundling can also capitalize on certain economies of scope. A possible example is the "shared" library files that perform OS and browser functions with the very same lines of code and thus may save drive space from the clutter of redundant routines and memory when consumers use both the OS and browser simultaneously." *Id.* at 87.

engage in a fundamental redesign of its operating system. The object of such a remedy is effectively addressed through other provisions that do not harm consumers.

3. There are no "Loopholes" in the RPFJ

Some critics of the settlement have opined that the RPFJ contains "loopholes" in the language that requires Microsoft to disclose APIs (application programming interfaces) to software developers. *See Washington Post,* "Wording of Microsoft Deal Too Loose, Analyses Say," January 18, 2002, E01. The settlement requires Microsoft to make such disclosures with respect to its browser, Internet Explorer, and other software such as Windows Media Player so that software developers may create competing software that interoperates with the Windows operating system. The allegation that the settlement has loopholes in this regard, however, is based on a faulty interpretation of the plain language of the settlement agreement.

Section III.D of the RPFJ requires Microsoft to make available "the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product." The term Microsoft Middleware is defined as software code that is contained within the operating system, but for which updates are distributed separately. The definition also requires, *inter alia*, that the software code be trademarked. The two programs cited by critics of the settlement as possibly excluded from disclosure requirements, Internet Explorer and Windows Media Player, are, however, clearly within the definition. Both are included within the Windows operating system as an initial matter and updates to both are distributed separately.[2] Moreover, both the logos and the words covering Internet Explorer and Windows Media Player are trademarked.[3]

A natural reading of the RPFJ demonstrates that there are no "loopholes" that would frustrate the overall intent of the document. The definitions are constructed in such a way to give meaning to certain terms, including "middleware," that otherwise would be susceptible to a wide variance of interpretation. While some who are critical of the settlement may prefer broader definitions of certain terms, the danger in over-expansive definitions is that they exclude nothing and thus become unworkably vague.

4. Provisions for Enforcement and Modification

CompTIA has carefully analyzed the enforcement provisions of the RPFJ and concludes that the enforcement provisions are stringent, thorough, comprehensive, and are carefully designed to insure that Microsoft comply with the substantive terms of the settlement agreement. In addition, the terms are creative in that they include provisions that are likely to speed the resolution of consumer and competitor disputes, rather than result in additional lengthy litigation over the terms of the settlement. In sum, CompTIA finds little support for the characterization of the enforcement provisions as weak, and instead believes that the enforcement mechanisms are

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[2] A comprehensive list of downloadable updates to software that is contained within the Microsoft operating system is located at the following url: **http://www.microsoft.com/downloads/search.asp?** Updates to Internet Explorer and Windows Media Player are distributed on this site.

[3] Publically available trademark information indicates that Internet Explorer is trademarked under serial Nos. 75663324 and 75340051 (assigned from Synet Inc.) and Windows Media, including descriptions of Windows Media Player are trademarked under serial Nos. 75663200, 75517785, and 75517786.

strong, effective, and will likely provide quick and effective resolution of any disputes under the agreement.

Plaintiff's Powers to Enforce: The RPFJ specifically provides that the United States or any of the individual states involved in the case have responsibility for enforcing the Final Judgment. To facilitate this enforcement, the Plaintiffs have the right to:

- inspect all books, records, ledgers, or any document within the control of Microsoft;
- inspect all source code for any Microsoft program;
- interview ***any*** Microsoft employee, and record such interview;
- order Microsoft to prepare any report under oath regarding any matter in the Final Judgment.

These access provisions give the Plaintiffs essentially unfettered ability to obtain any piece of information that they seek with respect to Microsoft's compliance with the Final Judgment. There is no loophole or exception that would prevent the Plaintiffs from acquiring information relating to Microsoft's compliance with the settlement. Further, any information obtained by the Plaintiff's may be presented directly to the Court in order to secure Microsoft's compliance.

The Technical Committee: In addition to the wide latitude given to the Plaintiffs to inspect Microsoft documents, code, and personnel, the settlement agreement also establishes an independent three person "Technical Committee" (TC). This TC will be made up of experts in software design and programming and shall establish ***permanent*** offices at Microsoft's Redmond campus. The expense of the TC shall be paid by Microsoft and the TC shall have the power to hire any consultants necessary to assist them in their duties.

The TC's sole function is to monitor Microsoft's compliance with its obligations under the Final Judgment. Thus, the TC has complete access to all Microsoft documents, computer programs, personnel, equipment, and physical facilities. The TC members may direct Microsoft to prepare reports of any information and in any format the TC desires.

Most significantly, the TC will have complete access to the confidential source code of Microsoft's programs. The TC may study the code, interrogate the code, and interact with the code in order to insure that Microsoft is complying fully with the Final Judgment. The TC may interview any Microsoft employee regarding the source code and its operation. Again, there is no loophole or exclusion that would prevent the TC from obtaining any piece of information in any way related to Microsoft's compliance with the agreement.

And, any information obtained by the TC may be shared with the Plaintiffs and the Court. Indeed, the TC has an obligation to report its activities to the Plaintiff at regular six-month intervals. If, however, the TC has reason to believe that a violation of the agreement has occurred, it is obligated to report that fact ***immediately*** to the Plaintiffs and provide a written summary of the nature of the violation. The Plaintiffs may then ***immediately*** initiate a contempt proceeding against Microsoft in the U.S. District Court as that Court has ongoing jurisdiction to enforce the terms of the Final Judgment.

Microsoft's Internal Compliance Officer: Another important aspect of the RPFJ is a provision requiring Microsoft to appoint an internal compliance officer. This person has the responsibility to administer the company's compliance with the settlement agreement. The officer must circulate a copy of the Final Judgment to all officers and directors of the company and brief those people on the meaning of the Final Judgment and the requirements of the U.S.

antitrust laws. The compliance officer is responsible for securing the written certification from each and every officer and director in the company that they understand the terms of the Final Judgment, agree to comply with its terms, and that they understand that failure to comply may result in a finding of contempt of court.

Dispute Resolution: Any person may submit complaints concerning Microsoft's compliance with the Final Judgment to either the Justice Department, the States, the Technical Committee, or the Compliance Officer. Upon receipt of a complaint from ***any person*** the Plaintiffs may initiate an enforcement proceeding with the Court and seek to hold Microsoft in criminal or civil contempt. The Court has wide latitude to interpret the agreement, order compliance with the agreement, and/or impose fines or other sanctions upon the company.

Notwithstanding the Plaintiffs' ability to immediately seek Court intervention to resolve compliance issues, other dispute resolution mechanisms are available under the agreement. These less formal procedures allow complainants to quickly resolve compliance issues with the assistance of the independent Technical Committees's extensive knowledge of the Company's activities. ***Any person*** may submit a compliance issue to the Technical Committee for investigation. The TC shall investigate complaints, bring them to the attention of the Microsoft Compliance Officer and advise Microsoft of its conclusions and proposal for cure. The identity of any complainant may be kept from Microsoft to insure that no retaliation could possibly occur.

The only limitation placed on the TC's work is that its findings or recommendations in a informal dispute proceeding may not be admitted as evidence in Court, nor may the TC members be called to testify. This restriction does not interfere with the TC's responsibility to inform the Plaintiffs of any violation, explain the details of that violation, and provide supporting evidence to the Plaintiffs. Similarly, the restriction does not impede the Plaintiffs' ability to obtain and present all information obtained from Microsoft to the Court in support of the alleged violation. Instead, it permits the TC to actively and aggressively use every method possible to quickly negotiate the resolution of disputes between complainants and Microsoft without having the work-product of that negotiation process made public. Protecting the TC members from having to testify is consistent with the rules of every mediation session undertaken within the U.S. legal system. It encourages the parties to be fully candid and forthcoming before the TC in attempting to resolve disputes under the settlement agreement.

In sum, the extensive power and access that the TC has under the settlement agreement insures that the informal complaint procedure will not be a dead letter. Because the TC has full access to every book, record, person, and program at Microsoft, and has the ability to order Microsoft to prepare any report it wishes, the TC can make life very difficult for Microsoft. Indeed, Microsoft has great incentive to satisfy the TC and avoid compliance issues altogether. The TC will provide an effective procedure for quick resolution of complaints against Microsoft – typically far quicker than if a contempt proceeding were initiated.

The enforcement provisions of the RPFJ grant extremely broad powers of access to both the Plaintiffs and to the independent Technical Committee. Both entities have the power to present the information they obtain from Microsoft to the Court to insure Microsoft's compliance with the settlement agreement. The Court has wide discretion in punishing Microsoft for violations of the Final Judgment and the RPFJ specifically provides that the terms of the agreement may be extended for an additional two years if Microsoft has engaged in a pattern of willful violation. The RPFJ also includes a wide array of formal and informal dispute resolution mechanisms that give a complainant maximum ability to resolve disputes quickly and fairly.

Charles James, head of the DOJ's Antitrust Division, testified that "[t]he proposed decree contains some of the most stringent enforcement provisions ever contained in any modern consent decree." CompTIA's review of the enforcement procedures supports Mr. James' conclusions. The establishment of an exceptionally powerful Technical Committee as a permanent fixture on Microsoft's campus is unprecedented. The Technical Committee's investigatory duties and duties to report directly to the Plaintiffs insures that the enforcement provisions have the power necessary to force Microsoft to comply with the substantive terms of the Revised Proposed Final Judgment.

C. Anticipated Effects of Alternative Remedies Actually Considered

While the November 6, 2001 Revised Proposed Final Judgment goes beyond the liability found by the Court of Appeals in some areas (i.e., by requiring Microsoft to disclose its confidential technical information relating to servers), the non-settling States' proposal filed on December 7, 2001 goes so far beyond the judgment as to bear little relationship to the Court of Appeals decision.

The centerpiece of the states' remedy demand is that Microsoft be compelled to create and market a stripped down version of its Windows operating system that would not include many of the features that current versions of Windows do include. Since consumers can now easily remove Microsoft features from their desktop and OEM's are free to place non-Microsoft programs on the desktop, it is difficult to see how this requirement would benefit consumers.

Instead of giving consumers more choices of software products, this unwarranted intrusion into marketing and design decision by the non-settling States would cause further delays in the development of software created to run on XP, with developers waiting to see which version would become the standard. Such delays would further postpone the salutary effects of XP on the computer market. It would also hamper programmers' ability to take full advantage of technological improvements in Windows, creating a marketplace in which the same software applications would not necessarily have the same functionality. This remedy would balkanize the computing industry and would undermine the benefits consumers obtain from a standardized operating platform.

In addition to the stripped down version of Windows, the December 7, 2001 proposal would also require Microsoft to continue licensing and supporting prior versions of Windows for five years after the introduction of a new version of Windows. The primary effect of this requirement is to impose unnecessary costs upon Microsoft (that would likely be passed on to consumers) and reduce the incentives for Microsoft to improve the operating system. This disincentive to Microsoft to make technological advances would ripple throughout the software industry as applications developers would not have an advancing platform to write software to.

The non-settling States remedy proposal also includes a variety of restrictions that will have little if any quantifiable benefit to consumers but which will simply advance the interests of Microsoft competitors. Consumers and OEM's currently have full ability and freedom to include Java software on their computers; the States' requirement that Microsoft carry Java on all copies of Windows does not provide consumers or OEM's with any more choice than they already have. Similarly, the requirement that Microsoft continue to produce an Office Suite for

Macintosh interferes with natural market forces that direct resources to the best use and may actually preclude the success of competing applications software. Directing Microsoft to produce and support any software without regard for market forces is likely to harm consumers, not help them. Moreover, the November 6 Proposed Judgment fully addresses and prevents Microsoft from retaliating or taking any anticompetitive actions against Apple.

Advances in technology are frequently made as a result of joint ventures between competitors. The Department of Justice and the Federal Trade Commission have recently released guidelines for the formation of such joint ventures. Notwithstanding the recognition by these enforcement agencies that most joint ventures are pro-competitive, the non-settling States seek to restrict Microsoft from entering into joint ventures whereby the parties to the joint venture agree not to compete with the product that is the subject of the joint venture. This restriction will chill innovation and prohibit countless consumer welfare enhancing arrangements. Further, this proposal flatly ignores the fact that the Court of Appeals found in Microsoft's favor on the issue of the alleged illegality of its joint venture proposal to Netscape.

The most harmful of the remaining remedy proposals include those that require the extensive and mandatory sharing of Microsoft's source code, without compensation to Microsoft. The non-settling States proposals in this regard go well beyond those in the November 6 Proposed Final Judgment and appear to be aimed at benefitting Microsoft's competitors rather than insuring a level playing field for all participants in the software industry. In the absence of compelling justification for wholesale and forced disclosure of a company's intellectual property, the harm caused by such disclosure is unwarranted and harmful to the entire technology marketplace. The vigorous protection of intellectual property has fueled the rapid and dynamic growth of the technology industry. Actions that erode protections for intellectual property should be viewed with great trepidation.

The long term effects of the conduct restrictions proposed by the non-settling States encourage continued litigation, rather than competition in the marketplace.

IV. CONCLUSION

The RPFJ will never be and cannot be all things to all people. But, in the end, it is a reasonable result given the respective positions of the both sides in this litigation. In assessing the effectiveness of the current settlement, the Court should recognize that the marketplace is far different than it was at the time the case was originally brought in May 1998. The Court of Appeals spoke to this very issue:

> [J]ust over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second. Conduct remedies may be unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless).

United States v. Microsoft, 253 F.3d 34, 49 (D.C. Cir. 2001).

CompTIA does not interpret the Court of Appeals' language to support the proposition that minimal or no remedies should be imposed upon Microsoft because advancing technology has made the browser wars or other issues in the 1998 lawsuit irrelevant at this point in time. However, it appears that those who now seek to impose more far-reaching remedies against Microsoft are excessively focused on the marketplace as it was in 1998, ignoring its state in 2002. The advances in server technology, wireless and handheld devices, and web based applications all diminish the overall competitive significance of the Windows desktop. Thus, for example, the goal of attempting to inject more competition into the browser market at this time has little competitive significance to the overall technology marketplace.

The goal of the settlement in this case should not be to penalize Microsoft for past behavior, nor should it be to benefit Microsoft's competitors by forcing Microsoft to license its source code against its will. The settlement should insure that Microsoft does not engage in the actions found unlawful by the Court of Appeals. This consent judgment does just that and therefore it should be approved.

Respectfully Submitted,

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